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Supreme Court of the United States

CHARLES L. MCNALLY,
Petitioner-Appellant,

against

HENRY C. HILL, Warden, United States Northeastern Penitentiary, Lewisburg, Pa.,
Respondent-Appellee.

Petitioner, by his attorney, John S. Wise, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in the above entitled case on the 13th day of February, 1934.

Questions Presented.

I. Can the National Motor Vehicle Theft Act (also called the Dyer Act), Section 1-5 of the Act of October 29, 1919, 41 Stat. 324, embodied in Section 408 of Title 18, U. S. C. A., confer jurisdiction upon a District Court of the United States to impose a sentence of imprisonment upon a defendant under an indictment for the sale of an automobile theretofore stolen and transported in Interstate Commerce after the automobile had arrived in another State and was no longer in the category of the statute: "moving as, or which is a part of, or which constitutes interstate or foreign commerce"?

II. Has the District Court of the United States for the Eastern District of New York jurisdiction to try and sentence to imprisonment a citizen charged with the sale in the State of New Jersey of an automobile theretofore transported in interstate commerce into the State of New Jersey?

Statement.

The petitioner, Charles L. McNally, was indicted in the District Court of the United States for the Eastern District of New York at the June Term, 1931, on charges of violation of Title 18 U. S. C. A., Sections 88 and 409. There were two indictments, No. 28944, containing three counts, and No. 28945, containing one count. Petitioner was tried and found guilty on both indictments on all counts and sentenced to the United States Penitentiary to serve concurrent terms of two and four years on counts one and two of indictment 28944 and two years on indictment No. 28945, which, because of its date of commencement, beginning approximately at the same date as counts one and two in indictment No. 28944, was practically a concurrent sentence.

On count three of indictment No. 28944, appellant was sentenced to an additional four years to be served consecutively to the sentences under counts one and two of indictment No. 28944, making an aggregate sentence of eight years.

While serving his sentence in the United States Penitentiary at Lewisburg petitioner on April 6, 1933, petitioned the District Court of the United States for the Western District of Pennsylvania for a writ of habeas corpus, alleging that the sentence of four years on count three of the indictment No. 28944 was invalid and void because that count in charging defendant sold a stolen automobile in Jersey City, in the State of New Jersey, charged the defen-

dant with no crime of which the Federal Court had jurisdiction and alleging that the verdict, judgment, sentence and commitment under which he is now being held to serve the four year sentence imposed by the District Court upon the third count of indictment No. 28944 was imposed by the Court without power, authority or jurisdiction (Transcript of Record, pp. 6-7). His petition of habeas corpus was denied. He appealed to the Circuit Court of Appeals for the Third Circuit, and the denial of his petition was affirmed by that court, and he is now held in custody by the appellee below, Henry C. Hill, warden.

Specifications of Errors to be Urged.

The errors which petitioner alleges as grounds for the granting of the writ of certiorari and for reversal of the judgment of the Circuit Court of Appeals for the Third Circuit are:

1. The Circuit Court of Appeals erred in affirming the order of the Court below, denying the petition for writ of habeas corpus.

2. The Court erred in holding that the District Court for the Eastern District of New York had jurisdiction to try and sentence petitioner on an indictment which charged petitioner with selling a motor vehicle in the State of New Jersey, which had been stolen in New York and theretofore transported in interstate commerce from Brooklyn, New York, to Jersey City, in the State of New Jersey.

3. The Court erred in holding that the third count of the indictment No. 28944 showed that the characteristic of interstate commerce remained in the vehicle at the time of sale, when the indictment, in exact words, states that the

"• • • said motor vehicle *had theretofore* been transported in interstate commerce from the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York, to Jersey City, in the State of New Jersey." (Italics ours.)

Reasons for Granting the Writ.

The decision of the Circuit Court of Appeals for the Third Circuit in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Grimsley* v. *U. S.*, 50 F. (2) 509.

The decision is in conflict with the decision of the District Court, Northern District of Georgia, Atlanta Division, in the case of *Ventimiglia* v. *Aderhold*, 51 F. (2) 318.

The decision is in conflict with the Circuit Court of Appeals of the United States for the Second Circuit in the case of *U. S.* v. *Drexel*, 56 F. (2) 588.

The decision is in conflict with the provision of the Constitution of the United States, Article 3, Section 2, Clause 3, prohibiting the trial of the defendant outside of the District in which the alleged offense was committed.

The decision is also in conflict with the Constitution of the United States in that it holds the District Court of the United States has power to try and sentence a defendant upon an indictment which charges an offense against the laws of a State only and no offense against the statutes of the United States.

The decision here sought to be reviewed on certiorari puts the Circuit Court of Appeals of the United States for the Third Circuit on an important question of criminal law on a basis different from that accepted by any other Circuit of the United States in which the question has arisen.

The question involved in this case is one of federal law and jurisdiction, which, by this decision is unsettled.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit should be granted.

Dated, March 27, 1934.

JOHN S. WISE, JR.,
Attorney for Petitioner,
27 Cedar Street,
New York, N. Y.

UNITED STATES OF AMERICA,
STATE AND SOUTHERN DISTRICT OF NEW YORK, ss:

JOHN S. WISE, JR., being duly sworn, says that he is a member of bar of the Supreme Court of the United States, is the attorney for the petitioner herein, and is duly authorized by said petitioner to make and execute this petition on his behalf; that he has read the foregoing petition and knows the contents thereof, and that the matters therein stated are true to the best of his knowledge, information, and belief. Deponent certifies that he has examined the foregoing petition and the record herein, and that in his opinion it is well founded, meritorious, and entitled to the favorable consideration of the Court.

JNO. S. WISE, JR.

Sworn to before me this
27 day of March, 1934.

SEYMOUR JOSEPH
Notary Public N. Y. Co. No. 97 Reg. No. 5-J-44
Commission expires March 30, 1935

BRIEF IN SUPPORT OF PETITION.

POINT I.

The indictment charges no crime under the laws of the United States.

The third count on No. 29844 is as follows:

> "• • • on or about the 12th day of February, 1930, at Jersey City, in the State of New Jersey did unlawfully, knowingly, and wilfully, **SELL** a certain motor vehicle, to wit: a Lincoln Sedan, 1929 model, original motor number 59638, original serial number 59638, which said motor vehicle had **THERETOFORE** been **transported** in interstate commerce, from the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York, to Jersey City, in the State of New Jersey, and which said motor vehicle had theretofore been stolen from the true owner thereof, on or about the 14th day of December, 1929, at the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York, the said defendants knowing that the said car so sold as aforesaid, **had been** stolen and **transported** in interstate commerce; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided (Title 18, United States Code, Section 408)." (Caps ours.) (Record, p. 22.)

In the case of *U. S.* v. *Drexel* (C. C. A. 2) 56 Fed. (2) 588, the Court was considering a case of receiving and concealing an automobile stolen and then transported in interstate commerce.

In such a case the Court seemed willing to sustain an indictment on a presumption that it was received in interstate commerce, though the indictment did not expressly so state, but in sustaining that indictment, it definitely and distinctly stated it was:

> "• • • not within Grimsley vs. U. S. 50 F. (2d) 509 (CC5) where the indictment was wholly bare of the necessary allegations though guilty knowledge had been properly laid."

In the *Grimsley* case, the count of the indictment reads:

> "then and there unlawfully and feloniously, did sell a certain motor vehicle, to wit a Ford Sedan • • • then and there well knowing the same to have been transported in interstate commerce, • • • and then and there well knowing the same to have theretofore been stolen;"

This is practically a paraphrase of the count here under consideration but in its language is not so definitely a statement the vehicle was not in interstate commerce when sold. The Court says:

> "It is an essential element of the offense under the fourth section that the accused receive the motor vehicle while it is moving, as, or is a part of, or constitutes, interstate commerce. The act, as is apparent on the face of it, is based upon the commerce clause of the Constitution, and does not assume to punish one who receives or sells a stolen motor vehicle after it has ceased to move in, or be a part of interstate or foreign commerce. Brooks vs. United States, 167 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A. L. R. 1407. This essential element was not alleged in the indictments under consideration."

Grimsley v. *United States*, 50 F. (2d) 509.

> "It is true that each appellant was charged with knowledge that the automobile which it was alleged he received and sold had been previously transported in interstate commerce; but for all that appears in either indictment, *such transportation had come to an end and the automobile had come to rest in Florida long before the accused received or sold it*" (*id.*, p. 510). (Italics ours.)

Proceeding, the Court says:

> "The indictments, under the most liberal interpretation, charged only the ordinary offense against the state law of receiving stolen goods with knowledge that they had been stolen; they failed to charge directly or even by implication, an offense within the jurisdiction of the Federal District Court. An indictment is fatally defective which omits an essential element of the offence sought to be charged. Evans vs. United States, 153 U. S. 584."

The count here is more preclusive of the allegations required by the Statute than that in the *Grimsley* case.

There is no possibility of implying from the language used in the indictment here that the automobile sold was "moving as" or constituted a part of interstate commerce. The automobile is described here:

> "• • • which said motor vehicle had *theretofore been transported in interstate commerce.*"

We repeat, in the *Grimsley* case the Court said:

> "The act, as is apparent on the face of it, is based upon the Commerce Clause of the Constitution, and does not assume to punish one who receives or sells a stolen motor vehicle after it has ceased to move in, or be a part of interstate or foreign commerce. Brooks v. United States, 267 U. S. 432 • • •

> The essential element was not alleged in the indictment under consideration."

In the *Drexel* case the Court pointed out that the allegation that the motor vehicle was in interstate commerce at the time of its receipt and concealment, was indispensable, saying:

> "And it must be confessed that a strict construction would make the indictment defective since it was an essential element of the crime, one indeed without which the statute would extend beyond its constitutional scope, that the car should not have lost its character as a part of interstate commerce. If so construed, an error arises on the face of the record which was not cured by failure to object *in limine*."

An indictment must be strictly construed.

In *Brooks* v. *U. S.*, 267 U. S. 432, the Court said:

> "Of course this section can and does apply only to the storing and concealment of a stolen automobile with knowledge of its theft as a final step in the use of interstate commerce."

It will be observed that the language in the *Grimsley* case was

> "did sell a certain motor vehicle • • • then and there knowing the same to have been transported in interstate commerce • • •."

The language here is:

> "• • • which said motor vehicle had *theretofore* been transported."

This language precludes any suggestion that the car was in interstate commerce, when sold, and affirmatively alleges

that its movement in interstate commerce had ceased sometime prior to the sale.

The learned Court below says:

> "The Congress intended a sale of a stolen motor vehicle, which, having been unlawfully moved in interstate commerce and coming to rest, continued so closely related to that commerce as to remain 'a part of it'" (Opinion, p. 6).

But is it to be supposed Congress tried to enact a fiction that a *car that had theretofore* been transported in interstate commerce should be deemed to continue in interstate commerce indefinitely?

It is not a matter of what the Court might think Congress intended by the act, but a matter of what power Congress had to pass a statute to effect that purpose, if such was its purpose. Until this decision, it has been recognized and uniformly decided that when a car had come to rest in a state and ceased to be moving in interstate commerce, it ceased to be a part of interstate commerce, and Congress is without power to make its subsequent sale a crime. Congress did not pass an act providing that the sale of a car which had theretofore been transported in interstate commerce should be a crime. The statute reads:

> "Whoever shall • • • barter, sell or dispose of *any motor vehicle, moving as, or which is a part of, or which constitutes interstate commerce,* knowing the same to have been stolen, shall be punished • • •."

It positively precludes a crime being predicated upon the sale of an automobile which had theretofore been transported in interstate commerce. This was recognized in *Davidson* v. *U. S.*, 61 Fed. (2) 250, in the Fifth Circuit, where the Court said:

> "It is of course an indispensable ingredient of the offense that the car, at the time it was • • • sold or disposed of, was moving as, or was part of or constituted interstate commerce."

There Davidson was accused of selling a car that had been brought from Oklahoma to Kansas City by others sometime before the sale, and the Court said:

> "There is entirely omitted from the indictment any charge to the effect that the vehicle, at the time it is charged to have been received, concealed or stored, was moving as, or that it constituted interstate or foreign commerce. *It is no offense against any federal statute to receive or conceal or to store a car that has been stolen nor was it material that at some time the property had been transported in interstate commerce. It is essential to the offense that the property at the time it is charged that the defendant received and stored it, was moving, or was part of, interstate commerce.*" (Italics ours.)

The Court further said:

> "It cannot be said that the defect is one of form and not of substance. Manifestly, if this car was not in interstate commerce when received, the federal court has no jurisdiction, and the very language employed in the indictment negatives any inference that the car was part of interstate commerce at the time it was received and stored."

Davidson v. *United States*, 61 F. (2) 251 p. 256, C. C. A. (8th Circuit).

If this is true of receipt and storage, which may by implication be inferred to have been committed as an incident to transport, how much more is it true when applied to a *sale of property* which had *theretofore been transported in interstate commerce.*

POINT II.

(a) The omission of allegation that the car was in interstate commerce when sold is fatal to the indictment;

(b) Conviction under it gave the Court no jurisdiction to impose the sentence;

(c) And the question did not have to be raised *in limine*.

(a) That an indictment to be a basis for conviction of a crime must allege all the essential elements of a crime, is fundamental.

> *Grimsley* v. *U. S.*, 50 F.(2) 509 (C. C. A. 5);
> *Sonnenberg* v. *U. S.*, 264 Fed. 327;
> *Wong Tai* v. *U. S.*, 273 U. S. 80;
> *U. S.* v. *Drexel*, 56 F.(2) 588.

(b) The cases above cited will support the statement that if the indictment charged no crime, the Court had no jurisdiction to impose a sentence upon a verdict of guilty of such charge.

(c) In *Grimsley* v. *U. S.*, where the count of the indictment failed to charge that the car at the time of sale was in interstate commerce, it was held the conviction could not be sustained.

> "and this even in the absence of an attack of any kind upon the indictment in the Court below; Sonnenberg vs. U. S. 264 Fed. 327."
>
> *Grimsley* v. *U. S.*, *supra*.

The same was held in the case of *Ventimiglia* v. *Aderhold*, 51 Fed. (2) 308 (D. C. Georgia); *Davidson* v. *U. S.*, 61 F(2) 250 (C. C. A. 8).

In *U. S.* v. *Drexel* (C. C. A. 2), 56 Fed. (2) 588, referring to such a defective indictment, the Court says:

> "If so construed, an error arises on the face of the record, which was not cured by failure to object in limine. U. S. v. Carll, 105 U. S. 611, • • • Shilter vs. U. S. 257 F. 724 (C. C. A. 9); Dropps vs. U. S. 34 F.(2d) 15 (C. C. A. 8); Hardesty vs. U. S., 168 F.25 (C. C. A. 6); Grimsley vs. U. S., 50 F.(2d) 509 (C. C. A. 5). Moreover, no exception was necessary to raise it; it is open on mere appeal. Nalle vs. Oyster, 230 U. S. 165, 33 S. Ct. 1043, 57 L. Ed. 1439; Brown v. Carver, 45 F.(2d) 673, 674 (C. C. A. 8)."

POINT III.

The District Court of the United States for the Eastern District of New York had no jurisdiction to try or sentence the petitioner for the sale of an automobile in New Jersey.

Ventimiglia v. *Aderhold, supra;*
Brooks v. *U. S.*, 67 U. S. 432;
Grimsley v. *U. S.*, 50 F.(2d) 509;
Davidson v. *U. S.*, 61 F. (2d) 250 (C. C. A. 8).

In all these cases it has been held that the sale of an automobile in a State, though it may have been transported in interstate commerce was not a violation of the National Automobile Theft Act.

If after an automobile has ceased to move in or be a part of interstate commerce, the Dyer Act may be applied, there is no reason why the statute should not be held to attaint forever, a car once stolen and transported in interstate commerce, so that anybody who ever sells it thereafter may be convicted of the crime.

POINT IV.

The Certiorari Should Issue.

The decision in the case at bar holds a defendant may be tried, convicted and sentenced in a District Court of the United States on an indictment which charges an offense against a State other than that of the district in which he is tried, and charges no crime against the laws of the United States.

It is in conflict with the decisions above quoted in the Second, Fifth and Eighth Circuits of the United States Circuit Court of Appeals. We respectfully submit that the Writ of Certiorari prayed for should be granted and this Court should review and reverse the decision in this case which makes such conflict.

POINT V.

Petitioner was entitled to his writ of habeas corpus upon his petition in the lower Court and to his discharge thereunder, and the courts below should be reversed.

Respectfully submitted,

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